

September 28, 2009

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

FOR THE TENTH CIRCUIT

In re:

CARL BAILEY,

Movant.

No. 09-5112

(D.C. Nos. 4:06-CV-00456-HDC-PJC
and 4:02-CR-00169-HDC-1)
(N.D. Okla.)

ORDER

Before **MURPHY, GORSUCH**, and **HOLMES**, Circuit Judges.

Carl Bailey has moved for authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence in case 02-CR-169 in the United States District Court for the Northern District of Oklahoma. This panel ordered the United States to respond, which it has done. For the following reasons, we deny authorization.

After a mistrial and a second trial resulting in a hung jury, a jury at a third trial convicted Bailey of conspiracy to distribute marijuana. At trial, two co-conspirators testified how he hired them to drive two vans to transport marijuana between Arizona and Ohio, with Bailey providing the vans, a map of the travel route, and \$3,000 in cash for travel expenses. Other evidence also tied Bailey to the vans. The co-conspirators were stopped by the Oklahoma state patrol for a traffic offense on their way back to Ohio, and authorities discovered

a total of approximately 215 pounds of marijuana in the two vans. DEA Special Agent Lee Lucas testified how he arrested Bailey in Ohio about eleven months later and about drug paraphernalia and four user-quantity bags of marijuana he found in Bailey's Ohio apartment. Bailey was unsuccessful on direct appeal, *see United States v. Bailey*, 133 F. App'x 534 (10th Cir. 2005), and with his first § 2255 motion, *see United States v. Bailey*, 245 F. App'x 768 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 1286 (2008).

Bailey now seeks authorization to bring a second § 2255 motion. Under § 2255(h), a second or successive § 2255 motion may not proceed unless it (1) contains "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense" or (2) relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Bailey seeks to proceed under the "newly discovered evidence" test of § 2255(h)(1). He relies primarily upon the fact that since the denial of his first § 2255 motion, Lucas was indicted in Ohio for providing false and misleading evidence in DEA reports, concealing exculpatory evidence, and committing perjury in other cases.

First, Bailey alleges that the prosecution deliberately suppressed two pieces of evidence favorable to him: (1) test results showing that the substance seized

from his residence when he was arrested was not marijuana, and (2) an FBI memo indicating that federal prosecutors had concerns about the integrity of Lucas's testimony as early as 2003. Second, Bailey alleges that Lucas committed perjury by testifying that he seized marijuana from Bailey's apartment, because the substance was not marijuana.

As the United States points out in its response, the allegations about the test results are not supported by any new evidence. In support of his claim, Bailey does not identify any test results showing that the substance was not marijuana. Instead, he relies on a reference in his presentence report (PSR) to an Ohio county arrest (which apparently was based upon the four baggies seized when he was arrested for the charges in this case) for "possession of *counterfeit* controlled substance." PSR at 15 (emphasis added). Bailey's theory is that if the county arrested him for possession of a counterfeit controlled substance, rather than possession of a controlled substance, then the substance in the four baggies was not marijuana. But the PSR is not "newly discovered evidence," as it was available to Bailey prior to his sentencing and his first § 2255 proceeding. Further, there is nothing to show that there were any tests of the substance in the four baggies, that any such test results would be favorable to Bailey, or that the prosecution knew about them and suppressed the results. Therefore, Bailey has not shown that this portion of his first claim satisfies § 2255(h)(1).

As part of his first claim, Bailey also contends that prosecutors suppressed an FBI memo indicating that federal prosecutors had concerns about the integrity of Lucas's testimony as early as 2003. This allegation is based, at least in part, on "newly discovered evidence," as the existence of the FBI memo apparently was revealed during the proceedings against Lucas. It is not clear when the memo was authored and whether it was in existence at the time of Bailey's trial. But in any event, Bailey has not shown any reason to conclude that the federal prosecutors in his case in Oklahoma may have had access to or knowledge of the FBI memo, which apparently was in Ohio. Without more, we are not willing to impute knowledge of federal law enforcement operations in Ohio to Assistant U.S. Attorneys in Oklahoma. Thus, Bailey also has failed to show that the second portion of his first claim satisfies § 2255(h)(1).

For his second claim, Bailey argues that Lucas committed perjury in testifying that the substance seized in his apartment was marijuana. In response, the United States points out that Lucas's testimony was merely Rule 404(b) evidence, and highlights a great deal of other evidence (including testimony from the two drug couriers) tending to inculcate Bailey in a conspiracy to distribute a large quantity of marijuana. Even assuming that the newly discovered evidence of Lucas's indictment casts doubt on Lucas's credibility in this case, we are not convinced that, when viewed in light of the other evidence of record, Bailey has established "by clear and convincing evidence that no reasonable factfinder would

have found [him] guilty of the offense.” In light of the other evidence against him (including the Lucas’s testimony about the drug paraphernalia seized from the apartment, which Bailey does not challenge), Bailey’s allegations do not show that no reasonable factfinder would have found him not guilty because Lucas lied about the substance in the four baggies. Further, on cross-examination by Bailey’s counsel at trial, Lucas admitted that the substance in the baggies had not been tested. Thus, the jury was aware that Lucas’s testimony was his opinion. Accordingly, as with his first claim, Bailey has not shown his second claim satisfies § 2255(h)(1).

The motion for authorization to file a second or successive § 2255 motion is DENIED. This denial of authorization shall not be appealable or the subject of either a petition for rehearing or a petition for certiorari. 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker".

ELISABETH A. SHUMAKER, Clerk